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In the

Supreme Court of the United States

October Term, 1956

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

REPLY OF RESPONDENTS TO THE PETITION FOR CERTIORARI

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents W. L. Pickens and H. H. Coffield pray that the Petition for Writ of Certiorari herein be refused, and in support thereof present the following:

ATTACK ON JURISDICTION

Petitioner does not attack any statute of Texas nor any rule or order of the Railroad Commission but only the propriety of the judgment rendered by the Supreme Court of Texas on the basis of the established law of that state and therefore Petitioner presents no federal question and this Court has no jurisdiction.

The petition, pages 10 to 12, supports the above statement.

The opinion of the Supreme Court of Texas, copied on pages B63 to B81 of the petition, shows that that court sustained the judgments rendered by the lower courts on the ground that Petitioner had failed to establish its contention that it was a tenant in common with Respondents in the oil and gas leasehold estate in Lots 10 and 11, and further that the allocation of all the oil from the well on Lots 10 and 11 to Respondents was proper under the long established rule of capture which was held to be still valid and effective, and under the rule theretofore announced by the Commission of Appeals and adopted by the Supreme Court in *Japhet v. McRae, 276 S. W. 669.*

The property here involved is located wholly within the State of Texas. Petitioner's title to Lots 12 and 13 emanated from a patent issued by the State of Texas and mense conveyances out of the patentee. No federal grant, act of congress or treaty is involved. Petitioner only

acquired title to an oil and gas lease on these lots which is a defeasible fee. The rights conferred by this lease and the right to the enjoyment and use of the properties therein described are admittedly subject to reasonable regulations by the State of Texas in the exercise of its police power to prevent unnecessary loss, destruction and waste of this natural resource.

The oil and gas conservation statutes of the State of Texas, including Rule 37, are not under attack. The jurisdiction of this Court can only be invoked in cases of this nature when it is affirmatively shown that the state has denied the Petitioner a recognizable right under its laws in the enjoyment and use of its properties through the promulgation of invalid and unreasonable rules and regulations in respect thereto. Such is not this record since Petitioner admits the reasonableness and validity of the final orders issued by the Railroad Commission in granting Respondents a permt to drill a well of their own on Lot 11 and in refusing Petitioner's application to drill a well of its own on Lots 12 or 13.

Petitioner introduced in evidence the special field rules adopted by the Railroad Commission for the Hawkins Field without reserving the right to make an attack on the validity thereof. (Rec. 27, 393-400.) Rule 15 thereof provides for allocation of all of the oil produced in the field to the wells that have been drilled therein. Petitioner's complaint is that all of the oil produced from Respondents' well has been allocated to Respondents and none given to it; but it

has made no attack on the said allocation rule and could make none in this case because the Railroad Commission was the only necessary party to a suit attacking the validity of such an order *(Magnolia Petroleum Co. v. Edgar, 62 S. W. 2d 359, 361—error refused; Trapp v. Shell Oil Co., 145 Tex. 323, 198 S. W. 2d 424)*, and the failure to join this necessary party constitutes an admission by Petitioner of the validity of Rule 15 of said field rules. Since no attack was made in the state court on these field rules, it necessarily follows that the issue cannot be raised for the first time in this court.

In the light of the decisions of this Court in Railroad Commission of Texas v. Rowan and Nichols Oil Co., 310 U. S. 573 and 311 U. S. 570, and in Burford, et al. v. Sun Oil Co., et al., 319 U. S. 316, the application for certiorari should be refused.

More than thirty-five years ago the State of Texas was faced with the problem of prevention of the waste of oil and gas that had resulted and was resulting from the unrestricted drilling of oil and gas wells and unrestrained production therefrom. The legislature authorized the Railroad Commission to formulate rules and regulations for the prevention of such waste. In 1919 it adopted state wide Rule 37 providing for restriction of spacing of wells. This rule has remained substantially the same except that the spacing distances have been changed, and many special field rules have been adopted.

As this limitation created a situation in which the drilling of additional wells would give an operator increased production from his tract, there were numerous instances of subdivision of tracts of land for the purpose of securing the right to drill more wells.

A well drilled on one of these subdivisions was attacked in *Sun Oil Co. v. Railroad Commission, 68 S. W. 2d 609 (affirmed 126 Tex. 269, 84 S. W. 2d 693)*, and the Courts held, as stated in the petition for certiorari, that a subdivision made after the spacing rule became effective in the area did not give the subdivided small tract the right to an additional well to prevent confiscation, since allowing each subdivided part a well under this exception would provide a means of completely avoiding the spacing rule.

This decision is the established rule in Texas and is not here attacked. Thereafter many applications for permits to drill wells on such small subdivided tracts were granted or refused and the following are some of the reported cases that were appealed to the courts and resulted in denial of the right to drill, and consequent inability of the applicant to recover any oil.

Sun Oil Company v. Railroad Commission, 68 S. W. 2d 609;

Humble Oil & Refining Company v. Railroad Commission, 68 S. W. 2d 622;

Barnsdall v. Railroad Commission, 83 S. W. 2d 714;

Railroad Commission v. Lamb, 81 S. W. 2d 161;

Stanolind v. Railroad Commission, 92 S. W. 2d 1057;

Railroad Commission v. Wood, 95 S. W. 2d 1328;

Humble Oil & Refining Company v. Railroad Commission, 99 S. W. 2d 1052;

Magnolia Petroleum Company v. Railroad Commission, 105 S. W. 2d 787 (Rev. R. R. C. v. Magnolia, 109 S. W. 2d 967);

Shell v. Railroad Commission, 133 S. W. 2d 194;

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Atlantic Refining Company v. Buckley, 123 S. W. 2d 413;

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Humble Oil & Refining Company v. Potter, 143 S. W. 2d 135;

Railroad Commission v. Miller, 165 S. W. 2d 504;

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Shell Oil Company v. Railroad Commission, 247 S. W. 2d 448;

Burford v. Sun Oil Company, 186 S. W. 2d 306;

Tidewater Associated Oil Company v. J. K. Hughes Oil Co., 250 S. W. 2d 405.

This list does not include the denials of drilling permits to subdivided tracts that did not result in a statutory appeal, as was the case as to the several denials of permits to Petitioner and Respondents to drill their tracts, herein involved, considered separately. Nor does it include any such appeals that did not go beyond the trial court.

The rule that no well can be drilled on such a subdivided tract to prevent confiscation remained completely effective until the lessee of a small strip in the East Texas field secured a permit to drill a well thereon in exception to Rule 37 to prevent confiscation of property on the basis of the contention that the tract as it existed before the subdivision was entitled to one more well. The statutory appeal from this order reached the Supreme Court of Texas and it sustained this contention and held the permit order valid, though the application had been made only in relation to the small strip. *(Magnolia Petroleum Company v. Railroad Commission, 109 S. W. 2d 967.)*

Thereafter the courts limited the rule announced in that case by holding that if a tract entitled to one well to prevent confiscation has been voluntarily subdivided, the Railroad Commission can grant a permit for such well on one of the subdivided parcels pursuant to the applicant invoking jurisdiction of the Commission to consider the tract as it existed before subdivision, and to evidence and its finding that the best location for the well on the tract as it originally existed from a conservation standpoint is on

such parcel. *Railroad Commission v. Miller, 165 S. W. 2d 504.*

The rule thus established has been in force in Texas for many years and no claim for division of the allowable production from a well on one of the subdivided tracts with the owners of the other has reached the courts except in the case at bar, as is evident from the reported cases and from the failure of either party hereto to make reference to such a case. So it appears that Texas operators are satisfied with the rules thus established with the sole exception of Petitioner.

As Rule 37 is concededly valid, it is evident that the prohibition of drilling a small subdivided tract affords no ground for complaint. This is true because the limitation of drilling has been sustained as necessary to prevent waste and further because the rule relates only to subdivisions that are voluntarily made. As Rule 37 is equivalent to a statute, and all persons must take notice thereof in their dealings with oil and gas producing land *(Sun Oil Co. v. Railroad Commission, 68 S. W. 2d 609)*, it is evident that the person who leases a small voluntarily subdivided tract of land does so with knowledge that his right to produce oil therefrom will be very doubtful. As the subdivision in this case was voluntary, and Petitioner was fully advised as to these facts and it probably could not drill a well on said lots before it took its lease (Rec. 165, 824-825), it must be said that it bought a mere chance of title, and cannot now be heard to complain.

Petitioner asks this Court to render judgment pooling the oil and gas estate in Lots 10 and 11 with that in Lots 12 and 13 in violation of the expressed public policy of the State forbidding forced pooling. (Vernon's Texas Civil Statutes, Art. 6014, Sub. g.)

As said by the Supreme Court of Texas in this case:

> "* * * The Railroad Commission is without power from the Legislature or by decisions of this Court to do anything more than declare illegal the drilling of wells which are prohibited by Rule 37. The Railroad Commission cannot change the law of Texas. The Legislature of this State has heretofore conferred broad, extensive and exclusive regulatory powers upon the Railroad Commission of Texas in the regulation of the oil industry of this State, but the Commission has not been given the power to determine property rights as between litigants. The courts, whether sitting as court of law or equity, determine such matters in accordance with existing laws in Texas."

There can be no doubt that such a judgment would have a devastating effect on the oil and gas properties in Texas. The owners and numerous purchasers of royalty and other oil interests in properties from which small tracts have been segregated, and therefore not drilled, would all be besieged with demands and lawsuits for division of the oil theretofore and thereafter produced; as would the lessees of the tracts and the banks, and financial companies that have taken mortgages on the production therefrom. The arduous duties of the Railroad Commission and the courts of Texas would be burdened with numerous demands for decisions as to division of oil allegedly drained from such

tracts though such drainage depends on underground permeability, shale barriers, porosity, water drive, gas drive and regional migration, etc., so that even an intelligent guess is impossible.

In *Railroad Commission v. Rowan and Nichols Oil Company, 311 U. S. 570, 576*, this Court was asked to pass on the validity of an oil proration order of the Railroad Commission of Texas, as it is in the case at bar. In refusing to do so, the Court used the following language:

> "The Constitution does not provide that the federal courts shall strike a balance between ascertainable facts and dubious inferences underlying such a complicated and elusive situation as is presented by the Texas oil fields in order to substitute the court's wisdom for that of the legislative body. Standard Oil Co. v. Marysville, 279 U. S. 582. The real answer to any claims of inequity or to any need of adjustment to shifting circumstances is the continuing supervisory power of the expert commission. In any event, a state's interest in the conservation and exploitation of a primary natural resource is not to be achieved through assumption by the federal courts of powers plainly outside their province and no less plainly beyond their special competence. The Fourteenth Amendment was not intended for such ends."

The basis of the application is the claim that the oil beneath Lots 12 and 13 is being confiscated by Respondents; and this in the face of the undisputed testimony of Petitioner's witness, Speller, and the findings of fact of the trial court, and the Court of Civil Appeals, that it is impossible to say whether the oil produced by Respondents'

well comes from the north, south, east, or west. (Rec. 77-78, 830, Pet. B5.)

The oil originally under Lots 12 and 13 will doubtless be drained by wells on some land, but Petitioner failed to show that Respondents will get any of it.

In the statutory appeal from the order of the Railroad Commission granting Respondents a permit to drill a well on Lots 10 and 11, the Petitioner asked the Court to cancel this permit and also to decree the forced pooling of the oil and gas leasehold estate in Lots 10 and 11 with that in Lots 12 and 13, and for a declaratory judgment giving it half the proceeds of the oil produced by the well, less expenses (Rec. 89, 706, 728-729, 730-731), all of which relief was denied by the courts.

In *Pickens, et al. v. Ryan, 219 S. W. 2d 150, 153 (error ref., N. R. E.)*, the Court of Civil Appeals used the following language:

> "By their second assignment the appellants complain of the error of the court in holding that no permit could be granted by the Commission until the said four lots had been pooled for such production, and an application for the joint development of the four lots for the use and benefit of all owners had been made.
>
> * * * * *
>
> "This conclusion we do not believe finds support in law or in fact.
>
> "Art. 6014, Subd. g, Vernon's Civil Statutes, reads as follows:
>
> "'* * * however, it is not the intent of this Act to require repressuring of an oil pool or that the

> separately owned properties in any pool be unitized under one management, control or ownership.'
>
> * * * * *
>
> "The Railroad Commission does not have the power to force a pooling agreement upon unwilling owners of mineral estates, and the trial court in this case did not have the power or authority to force a pooling of the mineral estate."

The saving clause at the end of the opinion was certainly not intended to nullify the holding above quoted.

Petitioner, in the case at bar, attempts to secure a judgment that it is entitled to share in the net proceeds of the oil produced from the well on Lots 10 and 11 in the proportion its alleged leasehold estate on Lots 12 and 13 bears to the total. In the event a valid pooling agreement had been executed, the rights of Ryan would have been the rights herein claimed, no more, no less. An argument that the relief desired by Ryan in the case at bar is not prohibited by the statute quoted in the opinion of the Court of Civil Appeals is directly contrary to the truism that "things equal to the same thing are equal to each other."

The statute does not use the word "pooling" but prohibits forced "unitization" which, as held by the Court of Civil Appeals, is its equivalent.

Respondents, in their third amended original answer herein, pleaded allegations made by Petitioner in the Travis County statutory appeal from the permit order showing that said suit was instituted as such appeal and also for the purpose of obtaining a declaratory judgment as to the

legal rights, duties and obligations of Petitioner and Respondents arising out of the permit order granted by the Commission. (Rec. 821-822.) Other allegations were made by Petitioner in said Travis County case showing that the relief therein desired was substantially the same as that herein prayed for. The petition was introduced in evidence on the trial of the case at bar. (Rec. 89, 704-731.)

> "The Respondents' leases conveyed to them a determinable fee in the mineral estate of Lots 10 and 11; the Petitioner's leases conveyed to it a determinable fee in the mineral estate of Lots 12 and 13; only a written instrument with proper words of conveyance executed by all owners of any part of the mineral estate in any of the lots could change these rights so that Respondents and Petitioner would each own undivided interests under their respective leases in all four lots; no such instrument exists; the lots did not constitute a single drilling or producing unit; Petitioner has no rights in the oil produced from the well on Lots 10 and 11; and the Courts properly rendered judgment against it."

It is well established that an oil lease in Texas constitutes a conveyance to the lessee of a determinable fee in the oil in place under the tract and also of the right to produce from wells thereon such oil, and also all other oil that migrates to and is produced by wells thereon under the allocation orders of the Railroad Commission; and that leases and conveyances of rights thereunder are subject to the statute of frauds and the statute of conveyances *(31A Tex. Jur., pp. 193-197; Sheffield v. Hogg, 124 Tex. 290, 77 S. W. 2d 1021, 1024).*

Objections under these statutes were made in Respondents' pleading and to admission of evidence. (Rec. 802-803, 40-44.)

Pooling, unitization and tenancy in common of oil leases on separate tracts in which ownership of the royalty and leasehold estates are in different persons can all be effected only by written instruments constituting cross conveyances of the royalty and working interest oil estate in each tract to the owners thereof in the other; in short making a unit of the two tracts; and no difference in the effect of each on the rights of lessees and royalty owners is apparent.

In *Veal v. Thomason, 138 Tex. 341, 159 S. W. 2d 472,* the Supreme Court of Texas, discussing a unitized lease, used the following language:

> "To our minds, when we look to the substance and intent of this lease contract considered as a whole, the above-recited provisions can have no effect other than to constitute all the lessors of land in the unitized block joint owners, or joint tenants, of all royalties reserved in each of the several leases in such block, the ownership being in the proportion which the acreage of each lease contract bears to the total acreage of the unitized block."

As bearing on the nature of such contracts, Respondents also refer to *Southland Royalty Co. v. Humble, 151 Tex. 324, 249 S. W. 2d 914; Belt v. Texas Co., 175 S. W. 2d 622; Brown v. Smith, 141 Tex. 425, 174 S. W. 2d 43; Pickens v. Ryan Corp., 219 S. W. 2d 150, 154.*

As shown above the courts of Texas have construed Article 6014, Sub. g, Vernon's Texas Civil Statutes, as

prohibiting forced pooling of separate tracts of land for oil production purposes. *(Pickens v. Ryan, 219 S. W. 2d 150,* supra.) This interpretation will be followed by this Court.

It is also clear that, irrespective of the statute, such pooling or unitization cannot be forced on an unwilling owner of land. *(Dailey v. Railroad Commission, 133 S. W. 2d 219 (error ref.)* Aside from the financial perils involved in any partnership, it is evident the owner of a lease on a tract of land might well be unwilling to pool it with an adjacent tract because of personal objections to the lessee of the latter. Numerous disagreements can result from such pooling arrangements. For instance one party may desire to drill the well himself and the other to have the work done by a drilling contractor; one may desire to settle a strike and the other not; one may desire frequent taking of cores which is good practice but expensive and the other may object to this; one may desire to stop drilling and complete the well in the first horizon that will probably be productive and the other may wish to go deeper to discover whether there are other producing horizons lower down; if more than one producing horiozn is found, one may wish to dually complete the well and produce from both reservoirs and the other may regard this as bad practice and object to it, etc.

Men differ in their financial resources and in their business ideas. If a property owned by a man with limited resources and of very conservative ideas were pooled with land owned by another with ample property and a disposi-

tion to gamble (and there are many such in the oil business), such pooling would be practically certain not to work to the satisfaction of either party or to the benefit of the public.

It is likewise well established that the Railroad Commission cannot deny or limit the right of the owner of oil producing land in Texas to convey any part thereof to any other person, but can only deny him the right to drill a well thereon under its power to prevent waste of oil and gas.

It therefore appears that the Holmes heirs had the right to subdivide the four lots by leasing two to Smith and Morrison and two to Petitioner, and that Petitioner's argument that the four lots still remained a single production unit owned by it and Respondents as tenants in common should be rejected.

In *Mueller v. Sutherland, 179 S. W. 2d 801, 808,* the Court said:

> "It is thought to be fundamental that the rules and regulations of the Railroad Commission cannot have the result of effecting a change or transference of property rights. There is nothing in such rules as evidencing a purpose to effect any such change."

In *Nash v. Shell Petroleum Corp., 120 S. W. 2d 522, 524,* the Court considering the subdivision rule of May 29, 1934, said:

> "The Commission has only such powers as are expressly delegated to it, or which are essential to the exercise of its expressly delegated powers. Necessarily,

> therefore, its rules and regulations must bear some reasonably appropriate relation to the objective implicit in the expressly delegated powers—in this instance the conservation of oil (or gas) a natural resource of the state. The Commission's jurisdiction does not extend and has no relation to the transfer of real estate generally. * * *."

In the appeal from the District Court of Travis County of the judgment secured by Ryan against these Respondents the Court said:

> "The Railroad Commission has the power and duty to adopt rules concerning the conservation of the mineral resources of the State, but cannot limit the right to convey or partition by the owner of his land as to surface or mineral estate; * * *." *(Pickens v. Ryan Con. Pet. Co., 219 S. W. 2d 150, 154, error refused N. R. E.)*

The contention that a subdivided tract remains a single production unit is thus violently inconsistent with the statutes *(Vernon's Texas Civil Statutes, Art. 1288, Art. 3995, Sec. 4)* and the common law of Texas regarding the ownership and conveyance of real estate.

These statutes are as follows:

Article 1288:

> "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

Article 3995:

> "No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:
>
> * * * * *
>
> "4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or * * *."

Since the leases executed by the Holmes heirs covering Lots 10 and 11 constituted a conveyance to the lessee of the oil and gas in place thereunder and *the exclusive right to drill and produce and keep oil therefrom, with warranty of title,* and since the leases executed by the Holmes heirs to Petitioner constituted a similar conveyance to it of the oil and gas under Lots 12 and 13, it must certainly follow that the Railroad Commission of Texas by the adoption of Rule 37 or any other rule could not change these conveyances of real property so as to give each of the two lessees an undivided interest in the four lots instead of each having an exclusive interest in two. In so far as the production of the oil and gas is concerned, the limit of authority of the Railroad Commission was to adopt a rule as to the drilling of wells that was reasonably calculated to prevent waste and such rule could not prevent, modify, or abrogate conveyances of land by the owners thereof but could only limit the right of drilling of wells to prevent waste.

Petitioner's contentions are not limited to proceedings looking to issuance of a drilling permit, but are broadly made by Petitioner as nullifying the rights of Petitioner and Respondents in the leases of separate tracts, and substituting a joint lease of four lots, and thereby violently changing Respondents' rights in the oil to be produced from Lots 10 and 11.

Petitioner, in effect, contends that Respondents' lease on Lots 10 and 11, which reserved only 1/8th of the oil, still, in violent contradiction of its express words and of the warranty of title, reserved to the Holmes heirs and gave their subsequent lessees of Lots 12 and 13 the right to one-half of Respondents' part of the oil produced from the well drilled on Lots 10 and 11.

Subdivisions often result from conveyances of land and are regarded as being done with knowledge, and in the light, of the restriction of drilling oil and gas wells contained in Rule 37 which is equivalent to a statute. *(Sun Oil Company v. Railroad Commission, 68 S. W. 2d 609.)* Respondents were expressly given the exclusive right by their lease to produce, save and have 7/8ths of all of the oil that might come from a well drilled on Lot 10 or Lot 11, and an implication that they must give some of that oil to anyone else would be in direct conflict with the express terms of the written grant.

The only court opinion that treats such a subdivision as this as leaving the tract a single development or production unit is that in *Magnolia Pet. Co. v. Blankenship, 85 Fed.*

2d 553. As hereafter shown, this opinion has been consistently disregarded by oil operators and lawyers in Texas. The essential feature of the *Blankenship* opinion is that the Railroad Commission in such cases can divide the production of the well on one subdivided tract between the owners of the two subdivisions.

But Petitioner did not file a statutory appeal from any of the proration orders that gave Respondents all of the oil produced by their well nor from the order refusing its application for part of the oil. So the validity of any of these orders is not involved in this case.

Essentially the contentions of Petitioner seem to constitute a collateral attack on the validity of the Statute of Conveyances and of Sub. 4 of the Statute of Frauds or on the validity of Rule 37.

The former can well be ignored.

As to the latter, Rule 37 permits, indeed requires, issuance of a drilling permit order on a tract, however small, that was in existence as such when Rule 37 became applicable to the area.

As transactions with relation to land thereafter must be in the light of Rule 37, any subsequent subdivision is necessarily made with the knowledge that drilling will be limited by the rule.

In order that a subsequent subdivision shall not prevent the drilling, on one of the subdivisions, of the one well the tract was theretofore entitled to, the rule in the *Miller* case *(165 S. W. 2d 504)* was announced.

Certainly this does not deprive anyone of any right. The purchaser of a small tract after subdivision takes it with knowledge that only one well can be drilled on the two subdivisions to prevent confiscation, and he therefore leases one of the subdivisions with a limited right to produce the oil thereunder. This right is conditioned on his securing a valid drilling permit order to prevent waste or a valid permit order under the rule in the Miller *case to prevent confiscation.* The latter order must be based on evidence and a finding that the best location for a well on the tract as it existed before subdivision, in the light of prevention of waste and least disturbance of the drilling pattern of the field, is on his subdivision thereof.

Therefore the right of Petitioner in the oil under Lots 12 and 13 was not a vested right, but was conditioned on its securing an order that has been denied, and denial affirmed on statutory appeal.

In this connection this Court may take judicial notice of the fact that Rule 37 and the other conservation measures have been most effective in preventing waste of oil and gas. If not, Respondents suggest that the burden of proof to the contrary was on Petitioner and it failed to introduce any evidence to that effect.

Another conclusive reason why the arguments of Petitioner that the four lots constituted a single production unit should be disregarded is that the contentions are

utterly inconsistent with a basic principle of the law of real property. As said in *73 C. J. S., page 205:*

> "There is and must be title to all things real or personal if once subjected to ownership, and, hence, it is stated that title must at all times be vested in someone."

In *Hallas v. Evans (Supreme Court of Arizona), 208 P. 2d 985, 987*, the Court said, "The first law of titles is that property always has an owner."

In *Cornelison v. Yelton, et al., 296 Ky. 501, 177 S. W. 2d 879, 881*, it is said:

> "As pointed out in the case of Hardin, et al. v. Sherley, et al., 292 Ky. 275, 166 S. W. 2d 425, and cases therein cited, there can be no such thing as unvested title to real estate. The title is in someone at all times but never hovering about in the clouds waiting for the happening of some event, when it can be settled and fixed in some person."

The Supreme Court of Texas held in *Gulf Land Company v. Atlantic Refining Company, 134 Tex. 59, 131 S. W. 2d 73*, that the Railroad Commission cannot grant a well permit on a tract subdivided in derogation of Rule 37 to prevent confiscation; but can grant a well on such tract to prevent waste. When the Holmes heirs executed leases covering Lots 10 and 11 and other leases to another lessee covering Lots 12 and 13, it was not known whether the Railroad Commission would decide that two wells were necessary on the four lots to prevent waste. Therefore, if

the two tracts must be regarded as a single production unit in so far as prevention of confiscation is concerned, then the title to the four lots was "hovering about in the clouds waiting for the happening of some event when it can be settled and fixed in some person."

Thus, if the Petitioner's contention is sound, Lots 10, 11, 12 and 13, at the time of the execution of the leases thereon, could have been two production units to prevent waste, one of two lots being owned by Respondents in severalty, and the other of two lots owned by the Petitioner in severalty; or could have been one production unit of four lots to prevent confiscation owned jointly by Petitioner and Respondents, and this uncertainty as to the parties in whom the title to the leasehold estate in these four lots vested would continue until the Railroad Commission of Texas, pursuant to its exclusive original jurisdiction, decided whether it was necessary to drill a well on Lots 10 and 11 and also a well on Lots 12 and 13 to prevent waste; and in case the order announcing this decision should be attacked by statutory appeal in a District Court of Travis County, the question as to title would still remain undetermined until termination of this litigation.

THE LAW OF CAPTURE

Petitioner's contention is also utterly inconsistent with the law of capture as announced and enforced for many years by the courts of this state.

Petitioner seems to contend it has been modified by the adoption of Rule 37 by the Railroad Commission. It should

be a sufficient answer to this contention that the Commission has no power to change the law of Texas and that the limit of the effect of Rule 37 is to render illegal the drilling of certain wells that are prohibited thereby.

Petitioner contends that the law of capture is limited by the statements in several opinions to the effect that denial to an operator of a fair chance to recover the oil or gas under his land or their equivalent in kind amounts to confiscation. None of these cases involved a subdivided tract that had been denied the right to drill a well under the conservation rules.

In *Sterling v. Constantin, 287 U. S. 378*, this Court said:

> "Their (the lessees') right to the enjoyment and use of these properties, *subject to reasonable regulation by the state in the exercise of its power to prevent unnecessary loss, destruction and waste*, is protected by the due process clause of the 14th amendment."

Petitioner cites *Elliff v. Texon Drilling Co., 210 S. W. 2d 558*. In that case the Court, referring to the rule that the landowner has title to the oil and gas in place, said, "The only qualification of that rule of ownership is that *it must be considered in connection with the law of capture and is subject to police regulations.*" In this connection reference was made by the Court to operations *"within the spirit and purpose of conservation statutes and orders of the Railroad Commission."*

The Court also held that the drainage to the adjacent operators' land caused by the blowout could be ascertained *and that the law of capture did not apply to drainage caused by negligent waste or destruction of oil or gas.*

Neither condition exists in the case at bar.

Petitioner has cited no Texas decision, and Respondents know of none, that justifies its contention that the law of capture should be ignored in this case.

The decisions in *Japhet v. McRae* (adopted by the Supreme Court of Texas), *276 S. W. 669*, and *Mueller v. Sutherland, 179 S. W. 2d 801 (error ref. want of merit)*, are strongly to the contrary. In the former case, the Court said:

> "It seems to us that the only safe rule, and the only one free from such confusion, is one which gives the oil to the man who owns the land upon which the well is located."

The question herein presented as to tenancy in common or forced pooling, and also as to the law of capture, should in this Court be governed by the law of the State of Texas. *(Erie R. Co. v. Tompkins, 304 U. S. 64; Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202.*

The opinion of the Supreme Court of Texas in this case is based entirely on the established law of that state, and should be controlling.

Emphasis herein is ours.

CONCLUSION

For the foregoing reasons, Respondents submit that the writ of certiorari should be refused.

Respectfully submitted,

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MAY 1956
HAROLD B. WILLEY, C

No. 823

In the

Supreme Court of the United States

October Term, 1955

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

PETITIONER'S REPLY TO RESPONDENTS' REPLY TO THE PETITION FOR CERTIORARI

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

PRELIMINARY STATEMENT

The Petition for Certiorari and Respondents' Reply thereto clearly draw the issue in this case. Admittedly, Petitioner has been completely deprived of its property. The issue is simply whether this deprivation was reason-

ably necessary for the accomplishment of some police power purpose of the State of Texas.

The facts which draw the issue herein are plain and uncontradicted: For a valuable consideration, Petitioner secured an oil and gas lease upon Lots 12 and 13, and thereby became vested with property rights in the oil and gas in place under those lots which are subject to the protection of the due process clause of Section 1 of Amendment XIV to the Constitution of the United States. The State, by the application of the Railroad Commission Rule 37 (R. 388; 1940 amendment, R. 390), and by denying the relief sought in this suit, has absolutely and forever denied to Petitioner all right of use and enjoyment of its properties.

The only police power involved in this case is the power of the state to prevent waste of oil and gas by controlling the location and spacing of wells. This power was completely accomplished by limiting the 4-lot drilling unit to one well and by fixing the allowable production from that well. Private property rights in the oil allowed to be produced from that well have no relation to the prevention of waste. The confiscation of Petitioner's property by denying it the right to participate in the production from the one well authorized to be drilled on the four lots cannot be justified, therefore, on the ground that it was necessary to deprive Petitioner of its property in order to accomplish any police power of the state.

It is pointed out both in the Petition for Certiorari and in Respondents' Reply thereto that, under Rule 37, the

combined four lots here involved had to be considered as a single tract; that this combined tract was entitled, under Rule 37, to only one well and that well was for the purpose of preventing confiscation of the oil and gas underlying the combined tract; that Respondents' Rule 37 application upon which the well was granted specifically stated that the application involved all four lots; that the Railroad Commission of Texas, in granting Respondents' well permit, showed the well to be granted as as well upon all four lots; and that throughout the life of the well, it has been permitted to produce that amount of oil, and it has actually produced that amount of oil, to which it was entitled only if it is regarded as a well upon the combined four lots. Yet, in the face of these facts, it is contended by the Respondents that lots 12 and 13 are not entitled to share in the proceeds from the production of the well. In short, it is contended by Respondents that the well which was granted to protect the four lots from confiscation may be used to effect complete confiscation of Petitioner's oil and gas under two of the lots.

It is believed that the completeness of the confiscation effected here is most clearly established by the consideration that the result reached herein is exactly the same as if Petitioner had bought no oil and gas lease and Respondents had bought the oil and gas lease upon all four lots, rather than upon only two of the lots.

THE POSITION OF THE PARTIES AS SUBDIVISION LESSEES

In their reply to the Petition for Certiorari, Respondents recognize that, under Rule 37, the attempted subdivision of the four-lot tract here involved had to be disregarded, and the Lessees involved had to be relegated to their rights as they existed prior to the subdivision. It is further recognized that, under Rule 37, the Railroad Commission had to consider the four lots as a single tract, completely disregarding the attempted subdivision. The position of Respondents seems to be that, under Rule 37, the four lots must be regarded as a single tract for well permit purposes, but, after a well is located upon the combined tract for the purpose of protecting the combined tract from confiscation, the subdivision must then be fully recognized and the subdivision Lessee not granted a well under Rule 37 must have his property entirely confiscated.

No reason is suggested by Respondents, and no reason exists, why the combined four lots must be regarded as a single unit for drilling purposes, but not for production purposes.

As pointed out in the Petition for Certiorari, the permit to drill a well on the four lot unit here involved was justified solely for the purpose of protecting the oil under the four lots from confiscation by neighboring operators. It should be noted that the granting of the permit and the drilling of the well did not give protection—only production from that well served to protect the four lots from

confiscation. It follows, therefore, that the only way in which the four lots can be protected from confiscation is to regard the four lots as a single unit both for drilling and producing purposes.

It is contended by Respondents that the relief sought herein by Petitioner would constitute forced pooling or forced unitization in violation of the Statutes of the State. Petitioner submits that this question has long since been determined against the contentions of Respondents. When the courts of Texas adopted the rule that subdivisions made in derogation of existing well-spacing regulations must be disregarded in granting Rule 37 exceptions to prevent confiscation, the Court did not regard the result as forced pooling or as a deprivaion of a vested right. The Courts pointed out that they were not forcing the unitization of that which had been separated, holding that the parties by private contract could not, contrary to the conservation policy of the State, effect a subdivision which would bind the State in its administration of existing well-spacing regulations. In *Sun Oil Company v. Railroad Commission, Tex. Civ. App., 68 S. W. 2d 609; affirmed, 126 Tex. 269, 84 S. W. 2d 693*, the courts of Texas early announced the rule that attempted subdivisions must be disregarded when made in derogation of Rule 37, and in announcing this rule, it was stated that "this is not a denial to him of protection of a vested right legally existing; but only that no such right vests, or can vest in him or his assignees, under the facts and circumstances here presented, * * *." *68 S. W. 2d 609, 614.*

It should be pointed out here that it is the application of this rule to the facts here presented which makes it impossible for Petitioner to drill a well upon its two lots. Since, under Rule 37, the four lots must be regarded as a single unit, Petitioner is denied the right to protect itself from confiscation by drilling a well upon its portion of the unit.

Petitioner does not seek to put back together two separate tracts—rather, as pointed out by the courts, separate tracts for oil development purposes have never come into existence under the conservation laws of the State.

As stated in the Petition for Certiorari, Petitioner here seeks only to avoid wholly losing its oil in accordance with the holding in *Magnolia Petroleum Co. v. Blankenship, 85 F. 2d 553 (C. A. 5)*. The Court there held that it was "implied, if not expressed, in the act of subdivision that owners not allowed a well are not wholly to lose their oil," but Respondents assert that the opinion in that case has been "consistently disregarded by oil operators and lawyers in Texas." The inaccuracy of this conclusion is demonstrated by the record in this case. By reference to the Railroad Commission's Supplemental Brief in the prior Rule 37 litigation (Pl. Ex. 105, R. 91, 468-477), it will be seen that, in the prior Rule 37 litigation in which the permit granting the well here involved was sustained, the State, through its Attorney General, relied heavily upon the *Blankenship* case. In that brief, the State carefully pointed out to the Court that sustaining the well permit upon Respondents' lots would not deprive Petitioner of its oil, because the

holding in the *Blankenship* case would insure that Petitioner would be fully protected. Respondents were parties to that Rule 37 litigation, and they did not question the State's construction of the *Blankenship* case, nor did they repudiate the clear holding of that case; rather, the Respondents, in the Rule 37 proceeding, were willing to accept the benefits accruing to them from the State's construction of the opinion in the *Blankenship* case.

Contrary to the contention of Respondents, the relief sought herein by Petitioners in no way involves the oil and gas conservation policies of the State. As hereinbefore pointed out, the conservation policy of the State dictates only that the four lots involved must be regarded as a single unit and allowed only one well to protect the four lots from confiscation. Under this policy, which Petitioner does not attack, the only way to avoid the confiscation of Petitioner's property entirely is to grant the relief sought herein which would permit Petitioner to share in the proceeds of the production from the well granted to the four-lot tract.

Respondents suggest no way in which the public interest is served by the taking of Petitioner's oil. It is clear that Petitioner is deprived of its property and that the Respondents are unjustly enriched. The alternative, urged by Petitioner, takes no one's property, it unjustly enriches no one, it gives full force and effect to the conservation policies of the State, and it guarantees to all parties everything to which they are entitled, legally or morally.

Respondents cite *Burford, et al. v. Sun Oil Co., et al., 319 U. S. 316,* and *Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573* and *311 U. S. 570.* Petitioner submits that neither of these cases is material here. In the *Burford* case, this Court affirmed the judgment of the District Court dismissing the complaint holding that the District Court properly refused to exercise its equity jurisdiction when the complainant had not pursued its relief through the State administrative agency and the State Courts. It is apparent that the Petitioner has here fully exhausted all State procedure available to it.

In the *Rowan & Nichols* case, this Court refused to substitute its judgment for that of the Railroad Commission in a case where the issue was whether or not the complaining party had received its fair share of the production in the East Texas field. It is submitted that that case is no authority for the proposition that the State of Texas can absolutely confiscate Petitioner's property when such is not required to serve any public purpose.

THE RULE OF CAPTURE

In their reply, Respondents assert that the position of Petitioner is condemned by the Law of Capture. Obviously, if the Law of Capture were in effect in Texas without restriction, this controversy would never have arisen because under the unrestricted Rule of Capture, this Petitioner would have ample remedy through self help by drilling its own well to prevent the confiscation of which it complains. In the *Burford* case, supra, this Court pointed out that the

Rule of Capture has been limited in Texas. In the case at bar, the State has taken from Petitioner the remedy available to it under the Rule of Capture and presumes to substitute no remedy in lieu thereof to prevent the complete confiscation of Petitioner's property. Respondents seek to apply the Rule of Capture to a situation where it is self evident that the Rule cannot be applied. With respect to the Rule of Capture, Respondents cite *Japhet v. McRae, 276 S. W. 669*, but the case can be of no assistance here in view of the fact that it in no way involves the State's limitations upon the Rule of Capture. As previously stated, these limitations upon the Rule of Capture invoked by the State have given rise to this litigation, and since the State has taken from this Petitioner its rights and remedies under the Rule of Capture, that Rule should not be invoked by Respondents as they confiscate the property of Petitioner.

CONCLUSION

Petitioner respectfully submits that it is significant that Respondents' reply does not deny that Petitioner has been completely deprived of the use and enjoyment of its property. Respondents do not assert that this deprivation serves any public purpose. They do not dispute that, unless the relief sought herein is granted to Petitioner, all of the recoverable oil underlying Petitioner's lots will be produced by others. They do not deny that Respondents have been and are being unjustly enriched by producing and saving all of the oil allowed from the well granted to serve the

combined four-lot tract. In the absence of any considerations of public welfare, Petitioner earnestly urges that its property has been taken without due process of law and that it has been denied equal protection of the laws.

It is respectfully submitted that the Petition for Writ of Ceritorari should be granted.

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